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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER 1955 TERM

No. 261 Misc.

LEONARDO SALEMI,
Petitioner,

against

THE STATE OF NEW YORK,
Respondent.

PETITIONER'S REPLY BRIEF

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1. In connection with respondent's discussion of diligence (Brief, 18, 19) it is appropriate to note that counsel were no doubt misled by the way in which the hospital records were worded. On their face they indicated that Walter was able to talk (see S. M. 101, 107). It was not until Mrs. Cancro was found that it appeared that these entries were not to be taken literally (see S. M. 102, 107, 137, 147). Surely it was not strange that petitioner's counsel took these records at face value during the trial.

2. Respondent's brief is in error in suggesting (p. 22) that the statement in the record with reference to the federal question arising out of the exhumation proceedings (see Pet. p. 51) resulted from an application by petitioner's counsel after the decision to have the remittitur amended to recite other federal issues as well. The fact of the matter is that the statement in the record was contained in the opinion handed down by the Court and that no formal action was ever taken by the Court on the informal application made by counsel to the clerk.

In any event, we submit that this Court is in no way bound by the state court's having referred to only one issue as presenting a federal question. Here, as we have demonstrated in our petition (p. 12) federal issues of due process were raised in the state courts with respect to both the testimony of Janson and the dying declaration.

The cases cited (p. 22) have no bearing on the situation here presented. In *Thomas* v. *Iowa* (209 U. S. 258) no federal question appeared in the record since there was a reference only to due process and not to the Fourteenth Amendment. In the case at bar the record shows specific references to the due process clause of that Amendment (Pet. p. 12). In *McCorquodale* v. *Texas* (211 U. S. 432) the federal question had not been raised in the state courts until after decision there by the court of last resort. *Herndon* v. *Georgia* (295 U. S. 441) and *Stembridge* v. *Georgia* (343 U. S. 541) are to like effect. Here, at least with regard to the dying declaration, the federal issue was raised as soon as the facts became known. Moreover, in this case, the state court granted an application for rehearing so that it might consider the entire case as though on direct appeal to it (Pet. p. 26). Therefore it had before it the due process contention made by petitioner both in his coram nobis petition (Pet. p. 60) and in the motion for a new trial (Pet. p. 61) a contention also referred to in his reargument motion (Pet. p. 64).

3. Essentially respondent contends that the judgment below rests on an adequate state ground—namely, the view of the majority of the Court of Appeals that the evidence produced by petitioner did not measure up to the requirements of the applicable New York statute (Code Crim. Proc. § 465, subd. 7). But it is the essence of petitioner's contention that no state procedure can bar his right to a new jury trial where the facts are such that a refusal to grant such new trial would so shock the conscience as to amount to a denial of due process. In such a case the

situation is the same as though New York had no statute at all for granting new trials.

This Court has always decided for itself whether a supposed state procedure was really adequate to dispense with the necessity of avoiding decision of the federal issue. And it has not hesitated to look through form into substance. A few instances will suffice.

In *Davis* v. *Wechsler*, 263 U. S. 22, this Court reversed a state judgment on the ground that state procedures could not be so used as to defeat a federal right. In *Lawrence* v. *State Tax Commission*, 286 U. S. 276, this Court brushed aside the contention that an adequate state ground sufficed, finding it unsubstantial. In *First National Bank* v. *Anderson*, 269 U. S. 341, and *Brown* v. *Western R. of Alabama*, 338 U. S. 294, this Court rejected the contention that a state court's interpretation of pleadings disposed of the case on an adequate non-federal ground.

So here, whether or not the new facts cast such doubt on the jury's verdict that due process requires a new trial is a federal question this Court cannot avoid merely because the state court casts its decision in a form that suggests a non-federal ground. That was an evasion by the state court of its responsibility to deal with the federal question, an evasion which does not bind this Court. The basic issue is there and must be faced.

4. Finally (p. 24) respondent argues that there could be no issue of due process here because there was a hearing before Judge Goldstein. If the issue tendered had been one of the knowing use of perjured testimony (as in *Mooney* v. *Holohan*, 294 U. S. 103) or of a fraudulently doctored record on appeal (as in *Chessman* v. *Teets*, decided [illegible] 17, 1955), that argument would be pertinent. For in such situations the essential issue is the prosecutor's knowledge. That is a subject with which the trial jury had no concern, an issue to be determined at the

later hearing. But in the case at bar there was no dispute about the prosecutor's knowledge with respect to the mental condition of Janson.

It is not our contention that the state courts made incorrect findings of fact but rather that they should have made no findings of fact—in the ultimate sense. As soon as the record disclosed the serious question which existed with regard to the mental condition of Janson and the doubt cast on the reliability of the testimony with regard to the dying declaration, due process required the submission of those issues to a jury as part of the whole case, not a separate judicial resolution of them as issues of fact.

5. We wish to call the Court's attention to a case of which we have just learned, namely, *Taborsky* v. *State*, 116 A. 2d 433 (Advance Sheet of September 10, 1955), in which the Supreme Court of Errors of Connecticut reversed an order denying a new trial under circumstances very similar to the case at bar. There, as here, the only witness who identified the defendant became insane after he testified —although in that case the period of time was longer. There, as here, there had been some doubt about the witness' demeanor at the trial. There, as here, there was conflicting medical testimony on the issue whether or not the witness was insane at the time he testified. There, as here, there was considerable delay in bringing on the motion.

Nevertheless, the Connecticut court unanimously held that there should be a new trial. It pointed out (p. 435) that "in a case where human life is at stake, justice as well as humanity requires us to pause and consider before we apply those rules (that is to say, the rules relating to a new trial) in all their vigor".

The Court, moreover, pointed out that it was not the function of the judge passing on a motion for a new trial to resolve the conflicting evidence as to the mental competency of the witness and to determine that as a fact.

The Court said that the only question was the effect which this testimony would have both on the trial court in ruling as to the witness' competency to testify and, if the testimony were allowed, the effect of the new evidence on the jury. The court concluded that such testimony would have a very persuasive effect on a jury.

While the Court recognized that there had not been due diligence in all respects, it noted that the basic fact, namely, the subsequent insanity of the witness, was not known at the time of the trial. These considerations exist here also.

While, of course, this case does not discuss the issues in terms of due process, we submit that the Connecticut court, unlike the New York court, recognized the essential unfairness of permitting a man to go to his death under circumstances such as these and that such unfairness is what the due process clause was intended to protect against.

Respectfully submitted,

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